No. 94-1477

In The

Supreme Court of the United States

October Term, 1994

MARJORIE ZICHERMAN, Individually and as Executrix of the Estate of MURIEL A.M.S. KOLE, and MURIEL MAHALEK,

Petitioners,

v.

KOREAN AIR LINES CO., LTD.,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION

W. PAUL NEEDHAM
KEVIN M. HENSLEY
(Counsel of Record)
NEEDHAM & WARREN
10 Liberty Square
Boston, MA 02109
(617) 482-0500

Attorneys for the Petitioners/ Cross-Respondents

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COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Does the Death on the High Seas Act determine the types of damages recoverable in a case governed by the Warsaw Convention?

STATEMENT OF THE CASE

The Petitioners/Cross-Respondents Marjorie Zicherman and Muriel Mahalek (collectively, "Zicherman") here adopt the Statement of the Case set out in their Petition for Writ of Certiorari. In that Petition, Zicherman argued that the Court below correctly looked to general federal damages law to construe the phrase "damages sustained" in Article 17 of the Warsaw Convention. However, the Court below was too restrictive in its analysis, and erred by limiting loss of society damages to financially dependent relatives, and by barring recovery for mental injury.

In its Cross-Petition, Korean Air Lines ("KAL") now contends that loss of society damages are not recoverable under the Warsaw Convention in any circumstances. In particular, KAL argues that the Death on the High Seas Act ("DOHSA") must be applied to international aviation accidents over the high seas, and that DOHSA does not allow for loss of society damages. Zicherman opposes KAL's Cross-Petition.

SUMMARY OF ARGUMENT

KAL's Cross-Petition is supported only by authority decided under maritime law, not under the Warsaw Convention. The court below followed the majority rule when it rejected DOHSA as the exclusive measure of damages in a Warsaw Convention case. This majority rule avoids unfairness and inconsistent results.

ARGUMENT

I. THE DECISION OF THE COURT BELOW TO REJECT DOHSA DOES NOT CONFLICT WITH THE LAW OF THE WARSAW CONVENTION

In its Cross-Petition for Certiorari, Korean Air Lines ("KAL") focuses on a controversial aspect of federal maritime law. Specifically, KAL cites a number of decisions that have questioned whether or not loss of society damages may be recovered under general maritime law (Cross-Petition at 14-17). These decisions suggest that federal statutes such as the Death on the High Seas Act ("DOHSA"),[1] which do not allow recovery for loss of society, should be used to shape general maritime law even if they are not directly applicable to a particular maritime accident.

The obvious flaw in KAL's analysis is that *none* of the cases it cites involved the Warsaw Convention. Courts obviously look to DOHSA for guidance in a maritime accident where there is no statute or treaty of any kind that is directly applicable. In the case below, however, there is no such legal void; rather, the KAL Flight 007 tragedy is directly governed by the Warsaw Convention.

When Warsaw Convention cases are analyzed, the decision of the Court below fits squarely within the majority rule. Federal courts have consistently rejected KAL's argument that DOHSA must furnish the exclusive measure of damages where the Warsaw Convention applies. *See e.g., In re Air Disaster at Lockerbie, Scotland on*

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[1] 46 U.S.C. §761 *et seq.*

December 21, 1988, 37 F.3d 804, 828-29 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995); *In re Korean Air Lines Disaster of September 1, 1983; Bowden v. Korean Air Lines Co., Ltd.*, 814 F. Supp. 592, 597 (E.D. Mich. S.D. 1993); *In re Air Disaster Near Honolulu, Hawaii on February 24, 1989*, 792 F. Supp. 1541, 1546 n. 9 (N.D. Cal. 1990); *In re Inflight Explosion on Transworld Airlines, Inc. Aircraft Approaching Athens, Greece on April 2, 1986; Ospina v. T.W.A.*, 778 F. Supp. 625, 636 (E.D.N.Y. 1991); *In re Korean Air Lines Disaster of September 1, 1983*, 704 F. Supp. 1135, 1153 (D.D.C. 1988). There is no reason for this Court to grant KAL's Cross-Petition.

II. IT IS SENSIBLE AND JUST TO REJECT DOHSA AS THE EXCLUSIVE MEASURE OF DAMAGES UNDER THE WARSAW CONVENTION

Two excellent reasons support the decision of the Court below to reject strict application of DOHSA in Warsaw Convention cases. First, the Warsaw Convention uses a $75,000.00 damages cap to limit an international air carrier's liability, save for the rare case of willful misconduct.[2] DOHSA, by contrast, has no damages cap, but it does limit a shipper's liability to pecuniary damages only. It would be wrong to engraft DOHSA's limited liability scheme onto the Warsaw Convention, which already greatly restricts an air carrier's exposure to liability.

The second rationale that supports the decision below is uniformity. DOHSA applies only to deaths that

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[2] Warsaw Convention, Article 25, as modified by C.A.B. Order No. E-23780, *reprinted at* 49 U.S.C. App. §1502 note.

occur on the high seas beyond a marine league from the shore of any state, territory or dependency of the United States. 46 U.S.C. §761. However, not all international aviation accidents occur over the high seas. Thus, if KAL's position were adopted, some Warsaw Convention cases would be subject to DOHSA, and others would not be. This potential inconsistency would undermine the quest for uniformity that was central to the negotiation and enactment of the Warsaw Convention. *See* Lowenfeld and Mendelsohn, The United States and the Warsaw Convention, 80 Harv. L. Rev. 497, 498-509 (1967).

CONCLUSION

For the reasons discussed above, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

W. PAUL NEEDHAM
KEVIN M. HENSLEY
(Counsel of Record)
NEEDHAM & WARREN
10 Liberty Square
Boston, MA 02109
(617) 482-0500

Attorneys for the Petitioners/ Cross-Respondents Marjorie Zicherman and Muriel Mahalek